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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JESSE R. LOERA, Plaintiff and Appellant, v. IMPERIAL COUNTY SHERIFF'S DEPARTMENT, Defendant and Respondent.	D039883 (Super. Ct. No. 92243)

APPEAL from a judgment of the Superior Court of Imperial County, Jeffrey Jones, Judge. Affirmed.

Jesse R. Loera sued his employer Imperial County Sheriff's Department (the Department), for racial discrimination in violation of the California Fair Employment and Housing Act (the FEHA) (Gov. Code,[1] § 12900 et seq.), and retaliation in violation of

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1 All further statutory references are to the Government Code unless otherwise indicated.

the Public Safety Officers Procedural Bill of Rights Act (the Bill of Rights Act) (§ 3300 et seq.). Loera appeals an adverse judgment on the ground the jury's findings are unsupported by substantial evidence. We affirm the judgment.

BACKGROUND

In 1980 the Department hired Loera, who is Hispanic, as a deputy sheriff. In 1995 Eloida Escamilla and Denise Scott, two clerks with the Department, and Maribel Macias, a waitress at a restaurant Loera frequented in uniform, complained to the Department that he made sexual remarks to them. For instance, Scott reported that Loera commented on the color of her hair, and asked "is it the same down there," referring to her pubic hair. Escamilla reported that Loera harassed her at least once a week for a year, saying such things as "let's go out to the patrol car and fuck," and asking whether her curly hair was "the same down there." When Escamilla was eating a banana, Loera reportedly said, "that's the way you like them long and hard." Macias reported that when she asked Loera if he wanted cream with his coffee, he responded, "sure but I would want some of yours." Macias also stated that when she told Loera the price of certain candy in a display case was going "to go down pretty soon," he responded "I wouldn't mind for you to go down on me."

The Department conducted an investigation and concluded the women's claims were true, and Loera was dishonest during the investigation by denying their claims. After an evidentiary hearing, the Department terminated Loera's employment, effective February 3, 1996.

Loera appealed the matter to the Imperial County Employment Appeals Board (the Board), and three of the five board members voted to reinstate him with full backpay and benefits.[2] The Board, however, also recommended that Loera undergo sexual harassment training, and he attended a one-day class. When Loera returned to work, the Department transferred him from the South County substation to the North County substation, to separate him from Scott and Escamilla.

Loera then sued the Department, alleging his temporary termination constituted racial discrimination in violation of the FEHA, and his reassignment was retaliatory in violation of the Bill of Rights Act.[3] Loera alleged "that [C]aucasian officers, accused of more egregious acts of sexual harassment, were not terminated but were given lesser discipline," and the Department reassigned him to North County substation because he appealed the termination of his employment to the Board.

After trial, the jury found the Department neither discriminated nor retaliated against Loera. Judgment was entered for the Department on February 7, 2002.

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2 Loera requested that we take judicial notice of tape recordings of the administrative hearing and the Board's written findings. We denied the request without prejudice to him providing us with a copy of the superior court order showing the trial court judicially noticed the items. Loera submitted no such order, and thus the Board's reasons for reinstating him are not germane on appeal.

3 The first amended complaint also included causes of action for declaratory and injunctive relief under the Bill of Rights Act, but they were disposed of on summary adjudication and are not at issue on appeal.

DISCUSSION

I

Standard of Review

"[W]here a trial court's factual finding is challenged on the ground there is no substantial evidence to sustain it, the power of the reviewing court begins and ends with the determination as to whether, on the whole record, there is substantial evidence, contradicted or uncontradicted, that will support the trial court's determination. [Citation.] [¶] The appellate court views the evidence in the light most favorable to the respondents [citation], resolves all evidentiary conflicts in favor of the prevailing party and indulges all reasonable inferences possible to uphold the trial court's findings [citation]." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.)

II

Racial Discrimination

A

It is a violation of the FEHA for an employer to discharge or otherwise discriminate against any employee on the basis of race. (§ 12940, subd. (a).)[4] "In

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4 Racial discrimination is also prohibited by Title VII of the Civil Rights Act of 1964. (42 U.S.C. § 2000e et seq.) "In general, 'The language, purpose and intent of California and federal antidiscrimination acts are virtually identical. Thus, in interpreting FEHA, California courts have adopted the methods and principles developed by federal courts in employment discrimination claims arising under' the federal acts." (*Reno v. Baird* (1998) 18 Cal.4th 640, 659.)

general, there are two types of illegal discrimination. These are disparate treatment and disparate impact. Under the disparate treatment theory, with which we are concerned here, an individual is discriminated against when the employer 'treats some people less favorably than others because of their race, color, religion, sex or national origin.' [Citation.]" (*Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748 (*Heard*).)

In most disparate treatment cases, ". . . the plaintiff will not have direct evidence of the employer's discriminatory intent. Consequently, the United States Supreme Court has developed rules regarding the allocation of burdens and the order in which proof is presented to resolve 'the elusive factual question of intentional discrimination.' [Citations.] Thus, plaintiffs may demonstrate via indirect or circumstantial evidence that they were the victims of discrimination." (*Heard, supra,* 44 Cal.App.4th at p. 1749, citing *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 255, fn. 8; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.)

"The framework for these 'pretext' cases includes three steps. First, it is the plaintiff's burden to prove by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff proves the prima facie case, then the burden shifts to the defendant to prove some legitimate nondiscriminatory reason for its employment decision. Third, if the defendant carries this burden, then the plaintiff must have an opportunity to show by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." (*Heard, supra,* 44 Cal.App.4th at pp. 1749-1750, fn. omitted.)

Generally, the prima facie case for discriminatory discharge is comprised of the following elements: "(1) complainant belongs to a protected class; (2) his job performance was satisfactory; (3) he was discharged; and (4) others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class." (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1318; *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 200 (*Caldwell*).) However, the standard is not rigid or mechanical and the elements of the prima facie case may vary with the circumstances of the case. (*Heard, supra,* 44 Cal.App.4th at pp. 1750, 1756.)

"[W]hether or not a plaintiff has met his or her prima facie burden, and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court . . . ." (*Caldwell, supra,* 41 Cal.App.4th at p. 201.) Thus, these issues are ordinarily tested by way of a motion for summary judgment, motion for nonsuit or motion for directed verdict. (*Id.* at pp. 203-204.) When the case is submitted to the jury, as here, the prima facie case is ordinarily established and the jury "will have only to decide the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision." (*Id.* at p. 205.)[5]

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5 BAJI No. 12.01, in effect at the relevant time, lists the following elements for a claim of employment discrimination based on disparate treatment: the defendant's termination of the plaintiff's employment or other adverse employment decision; the plaintiff's race or other protected status was a motivating factor in the employment decision, and the plaintiff was damaged as a result. BAJI No. 12.01.1 defines "motivating factor" as "something that moves the will and induces action [even though other matters may have contributed to the taking of the action]."

B

After reviewing the entire appellate record, we conclude the jury's verdict is supported by substantial evidence. Indeed, Loera produced no evidence raising a reasonable inference of racial animus.[6]

Oren Fox, the Sheriff of Imperial County at the relevant time, reviewed any disciplinary action recommended against an officer and made the final decision. Fox testified the Department conducted an internal affairs investigation into the sexual harassment allegations against Loera, and the investigators found the allegations true. Fox terminated Loera's employment because of his "sexual harassment and untruthfulness" during the investigation.

Fox explained that had Loera admitted the truth of any of the sexual harassment allegations, he may have suspended Loera instead of firing him. In Fox's view, honesty is "paramount to being a good officer." He further stated: "[O]ne of the first and primary things that a law enforcement officer is responsible for is truthfulness. It's in the law enforcement code of ethics. . . . [I]f you have lost the honesty and truthfulness, then you are just not able to do your job in an appropriate manner." When asked whether Loera's race was a factor in his decision, Fox said "[a]bsolutely not."

James Burns, a chief deputy with the Department, supervised Loera at the relevant

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6 Although Loera was reinstated with full back pay and benefits, he claimed the temporary termination caused damages because he received straight pay for the several months he was off work instead of the higher amount he was earning for working the graveyard shift.

time. Burns testified he received a memorandum outlining sexual harassment complaints against Loera. He appointed officers William Hall and Sharon Housouer to perform an investigation. After taking statements from the complaining parties and other witnesses, Hall and Houser concluded the allegations of sexual harassment were true. Burns then discussed the matter with Fox and the assistant sheriff, after which he wrote a letter recommending that Loera be terminated "[b]ecause he denied that the events occurred" and Burns believed "he wasn't being honest." Burns denied that Loera's race influenced his recommendation.

Housoeur testified she and Hall together interviewed Scott, Escamilla, Macias, Loera and numerous other witnesses. Based on the interviews, Housoeur and Hall found the allegations of sexual harassment true.

The above evidence shows the Department had a genuine nondiscriminatory reason for terminating Loera's employment, and he failed to meet his burden of showing the reason was pretextual. Loera relies on his speculation the Department fired him because he is Hispanic. Loera also points out that he testified the allegations of sexual harassment were untrue. At most, however, the evidence on the issue conflicted. "The trier of fact is the sole judge of the credibility and weight of the evidence[.]" (*Estate of Teel* (1944) 25 Cal.2d 520, 526.) The appellate court does not assess the credibility of witnesses or reweigh the evidence. (*Camarena v. State Personnel Bd.* (1997) 54 Cal.App.4th 698, 701.) In any event, as the jury was properly instructed, the issue is not whether Loera was actually guilty of sexual harassment, but whether he proved race was a motivating factor in his termination.

Loera maintains he established the Department's stated reasons for his termination were pretextual, because it did not discharge white male employees for comparable conduct. A plaintiff may show discrimination through "comparative evidence of pretext"; that is, "evidence that he was treated differently from others who were similarly situated." (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 817.) However, the employees the Department disciplined less harshly than Loera were not charged with dishonesty in addition to sexual harassment, and thus they were not similarly situated to him.

Fox testified that in 1992 employees made sexual harassment charges against a Department employee named Kahler, and Fox suspended him for 30 days.[7] Fox said he considered discharging Kahler, but did not do so because he "admitted to most of the allegations," and he "was remorseful about the whole thing" and apologized to those he offended. Fox testified that Kahler was not charged with dishonesty. In contrast, Loera denied any wrongdoing and refused to apologize to the women he offended.

Moreover, Fox testified that in 1995 an officer named Gustafson received a five-day suspension for sexual harassment.[8] Fox did not fire Gustafson because he explained "he had been drinking and . . . he felt very remorseful" that he had embarrassed the female victim and his entire crew at a squad party. The Department did not charge

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7 Another witness of the Department testified that Kahler received "30 days, two weeks suspended" contingent on no further incidents.

8 The suspension was not actually imposed.

Gustafson with dishonesty. Further, Fox did fire Gustafson after a subsequent incident of sexual harassment, but he was allowed to retire before the effective date of the termination.

Notably, the evidence also shows the Department imposed discipline other than termination on Hispanic employees guilty of sexual harassment. Fox recalled at least one instance in which a claim of sexual harassment was brought against a Mexican-American deputy, and he administered discipline short of termination. Fox explained he looked at each case individually, without considering the employee's ethnicity. During his tenure with the Department, Fox fired approximately 50 employees, including Caucasians, Hispanics and "[v]irtually all races."

Further, Burns testified that in 1989 and 1991 he was involved in the investigation of two sexual harassment claims against Mexican-American male employees, and the allegations were sustained. The Department gave one of the employees a "counseling memo and a written reprimand." Burns was unaware of the discipline the Department imposed on the other employee, if any, but he knew the employee was not fired.

Ted Whitmer, the assistant sheriff between 1986 and 1997, confirmed that the Department imposed discipline other than termination on two Mexican-American employees for sexual harassment. Whitmer was involved in the discipline of Kahler, and Whitmore found him "[v]ery embarrassed [and] remorseful."

Loera's challenge of the jury's verdict on his racial discrimination claim is without merit.[9]

III

Retaliation

The Bill of Rights Act (§ 3300 et seq.) "provides a catalogue of basic rights and protections which must be afforded all peace officers by the public entities which employ them. [Citation.] The Act bespeaks the Legislature's determination that, because labor unrest and strikes produce consequences extending far beyond local boundaries, the maintenance of stable employment relations between peace officers and their employers is a matter of statewide concern." (*Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1805, fn. omitted.)

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9 Loera actually devotes most of his appellate briefing to his contentions the trial court abused its discretion by making certain evidentiary rulings, and the Department's counsel committed misconduct that denied him a fair trial. However, Loera admits he raised no objections below, and we thus deem appellate review of the issues waived. "Ordinarily the failure to preserve a point below constitutes a waiver of the point. [Citation.] This rule is rooted in the fundamental nature of our adversarial system: The parties must call the court's attention to issues they deem relevant. ' "In the hurry of the trial many things may be, and are, overlooked which could readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them." ' [Citation.]" (*North Coast Business Park v. Nielson Construction Co.* (1993) 17 Cal.App.4th 22, 28-29.)

Loera also asserts that notwithstanding his failure to object, this court must determine whether there were errors of constitutional proportion. Loera, however, cites no supporting authority. "Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, disapproved on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3; *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1693, fn. 2.)

Loera asserts the Department violated the Bill of Rights Act by reassigning him to the North County substation, "which was a long distance from where he had worked and lived for many years," in retaliation for his appeal to the Board.[10] Loera presumably relies on section 3304, subdivision (a), which provides: "No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure."

Again, the jury's finding is supported by substantial evidence. Fox testified he made the decision to transfer Loera from the South County substation near El Centro to the North County substation near Brawley, because Escamilla and Scott worked at the South County substation, and he wanted to limit Loera's contact with them. Fox explained he had "a responsibility to all of the other employees that they can [work] in a safe environment and not be subject to any harassment or any other problems that would be associated with that."

Further, Kahler testified that after the Department found him guilty of sexual harassment, it moved his office to separate him from the women he harassed, although the offices were necessarily in the same building. Whitmer testified he moved Kahler to an office next to him, and explained that "[o]utside of moving [Kahler] outside the building, I don't know where else you could have put him that would have put him further away" from the women.

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10 Although Loera suffered no reduction in job responsibilities, pay or benefits, he

Loera does not challenge the legitimacy of Fox's stated reason for reassigning him, if true, but submits the reason was pretextual. He relies solely on Fox's testimony he was disappointed by the Board's decision, and felt forced to reinstate Loera. The testimony, however, does not suggest Loera's reassignment was retaliatory. "Although the law requires employers to take employees back under [certain] circumstances, the law cannot compel employers to do so happily." (*Conkle v. Jeong* (N.D. Cal. 1994) 853 F.Supp. 1160, 1169.) Loera submitted no evidence permitting a finding of retaliation.

DISPOSITION

The judgment is affirmed. The Department is awarded costs on appeal.

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McCONNELL, P. J.

WE CONCUR:

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HUFFMAN, J.

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McDONALD, J.

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sought damages based on the increased time and expense of traveling to and from work.